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Supreme Court of the United States

OCTOBER TERM, 1941.

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. BERNARD S. COGAN,
Petitioner-Appellant,

vs.

MARY MANN,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Bernard S. Cogan, prays for a writ of certiorari to the Court of Appeals of the State of New York to review the decree of that Court in this cause filed February 27, 1942.

Summary Statement of the Matter Involved.

The petitioner and respondent were married in New York City in 1930 and had two children Mary Sheridan and Timothy, born in 1932 and 1935 respectively (fol. 18). The respondent sought a Reno divorce in 1940. Petitioner appeared in the action and the divorce was granted in August, 1940.

Petitioner, after consulting his parish priest consented to an agreement (fol. 23) to be incorporated into the Reno decree granting custody of the children to respondent except during July and August of each year and providing that if the children are not brought up in the Catholic faith, petitioner can have them on demand. On September 6, 1940 respondent married a non-catholic.

In August, 1941 the petitioner had the children lawfully at his mother's home in the State of Massachusetts (fol. 27) under the terms of the Reno decree, and in September, 1941 entered them in a parochial school (fol. 40), refused to deliver them to the respondent in New York State on the ground the respondent had failed to bring the children up in the Catholic faith, and other grounds (fols. 28, 29).

The respondent thereupon obtained a writ of habeas corpus which was served on petitioner in the State of New York, requiring petitioner to forthwith bring the children into the State of New York. Petitioner moved to dismiss for lack of jurisdiction over the children (fol. 30) which motion was summarily overruled, and brought the children into New York State by order of the Court without waiving objections to the jurisdiction (fol. 31). Some testimony was taken and the court summarily ordered that the children be delivered to the respondent in enforcement of the Reno decree (fol. 59) notwithstanding that the court found that it was more fortunate for the children to be with the father in Massachusetts, which they preferred (fol. 48).

The Question Raised.

The question raised is whether the Supreme Court of New York acquired jurisdiction by service of a writ of habeas corpus upon the petitioner within the State of New York to summarily enforce a Reno custody decree and adjudicate the custody of children residing and attending school in Massachusetts.

Jurisdiction of the Supreme Court of the United States in This Proceeding.

This writ is to review a final decree of the Court of Appeals of the State of New York, the highest court of the state, entered February 27, 1942.

Jurisdiction of this court is invoked under U. S. Judicial Code, Section 237, 28 U. S. C. A. 344. Petitioner claims that the exercise of jurisdiction over the said children of petitioner by writ of habeas corpus in the State of New York, when the children were actually living and attending school in the State of Massachusetts and the summary enforcement of a Reno custody decree were in violation of the "due process" clause of the United States Constitution. Petitioner was overruled on jurisdictional objections (fol. 30).

Petitioner believing that the children were held by null and void orders obtained a new writ of habeas corpus in the Appellate Division of the Supreme Court of the State of New York returnable September 29, 1941 (fol. 12) to recover the children and restore status quo.

The petition on which said writ was issued (fols. 16-45) particularly set forth (fol. 44) that the hearing on the first writ "was no hearing at all, was without jurisdiction and any order pursuant thereto was a denial of liberty in violation of the 'due process' clause."

The second writ was summarily dismissed on motion on the ground that the plea of lack of jurisdiction of the court on the first writ was not established (fols. 63-68) and unanimously affirmed by the Appellate Division (fol. 81), November 28, 1941, on the ground that no direct appeal from the first writ was before the court.

An appeal was taken to the Court of Appeals of the State of New York as a matter of right pursuant to Section 588 of the Civil Practice Act on the ground that

there was directly involved "the construction of the Constitution of this state and of the United States". The petitioner urged that if the Supreme Court of the State of New York on the first writ acquired no jurisdiction "then the appellant and the children had been deprived of their rights without "due process" of law in violation of the State and Federal Constitution".

The Court of Appeals unanimously affirmed the Appellate Division, February 26, 1942. If there had been no constitutional question raised then there would have been no jurisdiction as a matter of right and the court would have been obliged to dismiss the appeal.

> Valz v. Sheepshead Bay Bungalow Corp., 247 N. Y. 122.

Reasons Relied on for Allowance of Writ.

The reasons relied on for the allowance of the writ are that the highest court of the State of New York has decided a federal question of substance not heretofore determined by this court and of great public importance.

The question deals with the most personal rights of children and may seriously effect the entire future religion, character and bringing up of the said children which should not be allowed if there is any question of the court's jurisdiction and particularly where the decision occurred as the result of a summary proceeding without a full fair hearing.

The petitioner appealed directly from the first writ; sought to stay such appeal while proceeding directly on the second writ to test the jurisdiction of the first writ. The appeal was extended by stipulation until the final decision of the Court of Appeals, but the respondent refused further extension pending this petition and an order was entered in the Appellate Division dismissing the appeal

so that petitioner has no other way* of ever raising the questions adjudicated except on this writ.

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to be issued under the seal of this court directed to the Court of Appeals of the State of New York, commanding said court to certify and send to this court on a day to be designated, a true and complete transcript of the record and proceedings of the Court of Appeals for the State of New York to the end that this cause may be reviewed and determined by this court; that the judgment of the Court of Appeals of the State of New York may be reversed and that petitioner be granted such other and further relief as may be proper.

BERNARD S. COGAN,
By CARL E. RING,
Attorney for Petitioner.

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*Before the first writ was obtained and before the time to surrender the children, petitioner, to show good faith brought a plenary action in the Supreme Court of the State of New York to determine rights as between the parties and to confirm his claim to custody (fol. 29). After the commencement of the present proceedings, and hence not in the record, the plenary action was dismissed on motion of the respondent on the ground that petitioner could not attack the Reno decree even insofar as it affected the children who had never been in the State of Nevada.